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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYOMING; MONTANA, Petitioners, NORTH DAKOTA, Intervenor-Petitioner, TEXAS Putative Intervenor-Petitioner, WESTERN ENERGY ALLIANCE; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, Consolidated-Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and MICHAEL NEDD, in his official capacity as Acting Director of the Bureau of Land Management, Respondents,	Case No. 2:16-cv-00285-SWS consolidated with 2:16-cv-00280-SWS

WYOMING OUTDOOR COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; CITIZENS FOR A HEALTHY COMMUNITY; DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; ENVIRONMENTAL DEFENSE FUND; ENVIRONMENTAL LAW AND POLICY CENTER; MONTANA ENVIRONMENTAL INFORMATION CENTER; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL; SAN JUAN CITIZENS ALLIANCE; SIERRA CLUB; WILDERNESS SOCIETY; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; AND WILDEARTH GUARDIANS,

Intervenor-Respondents,

EARTHWORKS,

Intervenor-Respondent,

CALIFORNIA; NEW MEXICO,

Intervenor-Respondents.

TEXAS'S MEMORANDUM IN SUPPORT OF ITS UNOPPOSED MOTION TO INTERVENE AS PETITIONER FOR REVIEW OF FINAL AGENCY ACTION

Texas moves for leave to intervene as of right or, in the alternative, permissively and submits this memorandum in support pursuant to Federal Rule of Civil Procedure 24 and U.S.D.C.L.R. 7.1(b)(1)(C), 83.6(e). Texas seeks intervention to petition for review of final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and U.S.D.C.L.R. 83.6, in order to protect its interests. Texas does not seek to delay or extend the briefing schedule ordered by the Court.

INTRODUCTION

On Nov. 18, 2016, the Department of the Interior ("DOI"), Bureau of Land Management ("BLM") published its final rule, "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Rule"). The Rule regards waste from venting, flaring, and leaks during oil and gas production on federal land. The Rule is a final agency action reviewable by the Court. 5 U.S.C. §§ 551(13), 704. On Nov. 18, 2016, Wyoming and Montana petitioned for judicial review of the Rule. ECF No. 1. The Court denied a motion to enjoin the Rule on Jan. 16, 2017, ECF No. 92, and the Rule took effect on Jan. 17, 2017.

Courts are to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The Rule exceeds BLM's statutory authority under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–84, and Mineral Leasing Act, 30 U.S.C. §§ 181–287, and unlawfully seizes Texas's authority over non-federal minerals when Texas and federal tracts are combined through communitization agreements, 43 C.F.R. § 3217.11. The Rule also regulates air quality—solely the purview of EPA and EPA-authorized programs, under the Clean Air Act ("CAA"). 42 U.S.C. §§ 7401 *et seq*.; EPA Order 1110.2 (Dec. 4, 1970).

The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706. Venue is proper because DOI and BLM are departments of the United States

government; Ryan Zinke and Michael Nedd are officers of the United States; and this case relates to public lands in Wyoming and elsewhere. 28 U.S.C. § 1391(e).

The Rule impacts Texas's interests in regulating oil and gas, and air quality, within its borders. Texas has unique, split-estate configurations resulting in combinations of federal, state, and private mineral ownership. Federal management of Texas's oil and gas lands involves split estates. Even where the federal mineral ownership is small relative to other mineral ownership interests, now *all* the oil and gas operators with interests are subject to the Rule. The Rule significantly and adversely impacts Texas because it displaces Texas's sovereign authority and improperly asserts BLM authority over vast stretches of Texas—and privately-owned minerals—solely via interspersion with a small number of federal tracts.

Disposition of this litigation in Respondents' favor will frustrate and impede Texas's interests in administering its oil and gas programs, air quality programs, and the development of Texas's resources. The Rule harms Texas's interests in administering its law by displacing Texas's laws and regulations with an inconsistent federal program. Furthermore, the other sovereigns involved herein, with separate laws and regulations, cannot adequately represent Texas's distinct interests or protect its natural resources, air quality, economy, and the well-being of its citizens. Texas satisfies the requirements for intervention under Rule 24(a).[1]

I. Texas May Intervene as of Right.

A party seeking intervention of right must demonstrate (1) a timely application; (2) a cognizable interest in the property or transaction; (3) its interest will be impaired by disposition of the action; and (4) its interest is not adequately represented by existing parties. FED. R. CIV. P. 24(a)(2). These factors "are not rigid,

[1] In a similar case, the Court granted intervention where North Dakota demonstrated legally-cognizable interests, not adequately represented by existing parties, impaired by disposition of the case. *See* Order, *Wyoming v. Dep't of Interior, et al.*, No. 2:15-cv-00043 (D. Wyo. April 22, 2015).

technical requirements" under the Tenth Circuit's "somewhat liberal line in allowing intervention." *Coalition of Arizona/New Mexico Counties v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996). Texas satisfies all four requirements.

A. Texas's Intervention Is Timely.

Timeliness is measured "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001).

Texas seeks intervention shortly after the Court denied injunctive relief, ECF No. 92, and before briefing on the merits has begun. ECF No. 99. As indicated in the Certificate of Conference to the motion, the existing parties either do not oppose Texas's intervention, or take no position on Texas's intervention on the condition that Texas join the briefing of one of the existing Petitioners/Intervenor-Petitioner and otherwise do not affect the briefing schedule already set forth by the Court.

Texas acknowledges and adopts the existing briefing schedule and does not, by moving to intervene, seek to delay or extend the existing briefing schedule beyond the dates currently ordered. Moreover, Texas avers its intent to join the briefs to be filed by existing Petitioners, and not add an independent brief of its own, in accordance with U.S.D.C.L.R. 83.6(e) and 10TH CIR. R. 31.3. Thus, granting Texas's motion will not cause any delays or otherwise prejudice any party or the Court.

B. Texas Has Interests Directly Affected By This Litigation.

Texas has an interest in its land, natural resources, and air quality, as well as its regulatory programs which are adversely impacted by the Rule. As such, Texas has "an interest relating to the property or transaction that is the subject of the action[.]" FED. R. CIV. P. 24(a)(2). As the Tenth Circuit has clarified, it is not whether an intervenor-applicant has an interest in the litigation, but is instead "measured by whether the interest the intervenor claims is related to the property that is the

subject of the action." *Utah Ass'n of Counties*, 255 F.3d at 1250 (citation omitted).

Further, when a federal agency places Texas's "sovereign interests and public policies at stake, [the Court] deem[s] the harm [Texas] stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

1. Texas's Oil and Gas Regulatory Interests.

Ownership of minerals initially resides with the owner of the surface land. If the government owns the land, the government may also own the minerals. If the land is privately owned, the minerals may also be privately owned. Over time, ownership is frequently separated through sales, with the land having one owner, the mineral rights other owners. Owners of the minerals may then lease out to a "lease operator," the right to produce the minerals, retaining a royalty interest.

The surface and mineral estates in Texas are split, like many sovereigns (*e.g.*, Pennsylvania, Colorado, Oklahoma). Texas recognizes separate ownership of the surface and mineral estates, and the distinct private property rights that are associated with each. Owners may stipulate severance of the surface from the subsurface rights, leading to a "split estate" system.

The common law rule of split estates is that the mineral estate is "dominant." Such dominance is subject to common law, statutory, or regulatory limitations.[2] The Supreme Court has established rules for split estates. *See Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928). The rules are a template for split estate ownership involving the federal government. Where the mineral estate, or part of it, is owned by the federal government, but the surface is owned by another, the leasing process is managed by BLM. Otherwise, BLM is *not* in full control.

The Texas Railroad Commission (RRC) regulates the exploration, production,

[2] Kendor P. Jones, John F. (Jeff) Welborn, Chelsey J. Russell "Split Estates and Surface Access Issues," *Landman's Legal Handbook* ch. 9 p 183, § 9.03, Rocky Mt. Min. L. Fdn., 5th ed. (2013))

and transportation of oil and gas in Texas, something it has done since 1919.[3] RRC's primary responsibility is to conserve natural resources, prevent waste, protect the correlative rights of different interest owners, protect the environment, and ensure the safety in areas such as flaring and venting of natural gas.

RRC oversees all oil and gas wells in Texas, as well as those that own wells or engage in drilling. TEX. NAT. RES. CODE § 81.051. RRC (1) prevents the waste of natural resources, (2) protects the rights of different interest owners, (3) prevents pollution, and (4) provides safety. It accomplishes these goals through permitting and reporting requirements; field inspections, testing programs and monitoring activities; and through remedial programs regarding abandoned wells and sites.

RRC also administers Texas's oil and gas regulations, found at 16 TEX. ADMIN. CODE §§ 3.1–3.107. These regulations cover the drilling, producing, and plugging of wells; surface equipment removal; inactive wells; directional drilling; hydraulic fracturing; well spacing; operations to increase ultimate recovery; maintenance of pressure and the introduction of gas, water, and/or other substances into producing formations; disposal of saltwater and oil field wastes; and other operations. Texas has its own venting and flaring rules on oil and gas production. 16 TEX. ADMIN. CODE § 3.32. Because the Rule applies to, *inter alia*, "State or private tracts in a federally

[3] The Texas Railroad Commission (RCC) had its origin in the demands of the shipping public in the late 1880s that insisted that railroads be subject to regulation based on public interest. The RCC was the first regulatory agency created in the State of Texas and originally had jurisdiction over the rates and operations of railroads, terminals, wharves and express companies. The legal focus was on intrastate passenger and freight activities. The RRC's authority was broadened beginning in 1917 with the passage of the Pipeline Petroleum Law (Senate Bill 68, 35th Legislature, Regular Session) that declared pipelines to be common carriers like railroads and placed them under the RCC's jurisdiction. This was the first act to designate the RCC as the agency to administer conservation laws relating to oil and gas. The RCC's regulatory and enforcement powers in oil and gas were increased by the Oil and Gas Conservation Law (Senate Bill 350 of the 36th Legislature, Regular Session), effective June 18, 1919. This act gave the RCC jurisdiction to regulate the production of oil and gas. Acting upon this legislation, the RCC adopted in 1919 the first statewide rules regulating the oil and gas industry to promote conservation and safety. (Sources: *Guide to Texas State Agencies*, various editions; general laws and statutes; the Railroad Commission website (http://www.rrc.state.tx.us/about/index.php), accessed on February 9, 2009; and the records themselves.)

approved unit or communitization agreement," 81 Fed. Reg. at 83,079, and because of Texas's, the Rule directly preempts Texas's authority over its unique split-estate situation and a significant number of oil and gas units within its borders.

To carry out its responsibilities, RRC grants permits based on spacing and density rules. In addition, each month (1) RRC assigns production allowables, (2) receives production reports, and (3) audits the oil disposition path. Allowables are assigned according to well capability, reservoir mechanics, market demand, and past production. RRC also regulates injection and disposal wells. RRC also conducts waste management through pits and landfarming, discharges, waste haulers, waste minimization, and hazardous waste management.

When Texas joined the Union in 1845, it did not relinquish control of its public lands.[4] Thus, Texas is the only U.S. sovereign to control its own public lands. All federal lands in Texas were acquired by purchase (*e.g.*, military bases) or donation (*e.g.*, national parks).[5] And because Texas's territorial waters originated as an independent republic, Texas owns territory far beyond its coastline—significantly more than other coastal states. *United States v. Texas et al.*, 363 U.S. 1, 50 (1960), *supplemented sub nom.*, *United States v. Louisiana*, 382 U.S. 288 (1965). All of these lands (and the oil and gas deposits beneath them) are managed by the Texas.

Texas consists of split-estate lands adversely affected by the Rule. Nearly 3 million acres of federal land are located in Texas. These lands overlay oil and gas formations—mineral interests held by Texas and private citizens. These interests, and oil and gas produced therefrom, are subject to RRC regulation.

Across Texas, 429,232 acres of federal land were leased for oil and gas

[4] Joint Resolution for annexing Texas to the United States, J. Res. 8, enacted March 1, 1845, 5 Stat. 797. Joint Resolution for the admission of the state of Texas into the Union, J. Res. 1, enacted December 29, 1845, 9 Stat. 108

[5] Texas's public lands were significantly enlarged by the U.S. Submerged Lands Act of 1953 and the resolution of the ensuing Tidelands Controversy.

development in FY 2014, producing 273,000 barrels of oil and 38,250 million cubic feet of natural gas. Texas produces 35 percent of U.S. crude oil—more than any other State.[6] Texas has over 190,000 oil wells and over 100,000 gas wells. They support two million jobs and a quarter of Texas's economy.[7] Because Texas's oil and gas industry is the largest in the nation, Texas is disproportionately impacted by the Rule.[8]

2. Texas's Sovereign Air Quality Regulatory Interests.

The Texas Commission on Environmental Quality ("TCEQ") administers Texas's comprehensive and robust air-quality programs, including the Texas Clean Air Act (TEX. HEALTH & SAFETY CODE § 382.055, 30 TEX. ADMIN. CODE 101.1 *et seq.*) and CAA programs.[9] The CAA made Texas and EPA "partners." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The CAA contains several programs where EPA sets standards implemented and administered by Texas. *See generally* 42 U.S.C. § 7410. In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), air quality is improved "through state and federal regulation," *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). *See also* 42 U.S.C. § 7401(a)(3); 42 U.S.C. § 7407(a). BLM lacks the authority to regulate air quality. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (an agency's power is limited to the authority delegated by Congress).

C. Disposition of this Action May Impair or Impede Texas's Ability to Protect Its Sovereign Interests.

The Court's ruling "may as a practical matter impair or impede [Texas's]

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[6] *See* http://www.rrc.state.tx.us/oil-gas/research-and-statistics/production-data/texas-monthly-oil-gas-production/.

[7] The Texas oil and gas industry paid $13.8 billion in taxes and royalties in FY 2015. The oil and gas industry contributes more than a half billion dollars annually to Texas's Permanent School Fund, which supports Texas's K-12 public schools. Texas school districts received $1.9 billion in oil and gas mineral property tax revenue in FY 2015. Counties received $632 million in oil and gas mineral property tax revenue. Texas's Rainy Day Fund is funded almost exclusively by oil and gas severance taxes. *See* https://www.txoga.org/texas-oil-and-natural-gas-industry-paid-13-8-billion-in-taxes-and-royalties-in-2015-second-most-in-texas-history/.

[8] *See* Texas RRC letter to Janet McCabe, EPA, December 3, 2015.

[9] *See*, *e.g.*, TCEQ Air Pollution Control Reference Guide (http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf).

ability to protect [its] interests." FED. R. CIV. P. 24(a)(2). "[T]he impairment of [Texas's] substantial legal interest is possible if intervention is denied." *Clinton*, 255 F.3d at 1253. "This burden is minimal." *Id.* The Rule impairs Texas's interests, *supra*, by impeding its programs. The Rule also diminishes Texas's revenues.

First, the Rule impacts Texas's regulation of its oil and gas industry by asserting BLM authority over "State or private tracts in a federally approved unit or communitization agreement." 81 Fed. Reg. at 83,079. Texas's oil and gas lands consist of split estates, thus placing government and private minerals under federal control. Thus, the Rule places Texas's "sovereign interests and public policies at stake," *Kansas*, 249 F.3d at 1227, and deprives Texas authority over its minerals.

Under the Rule, operators must now obtain permits from both RRC and BLM. It takes up to 18 months to receive permits from BLM. Thus, operators must postpone activity though they possess a Texas permit. Delays frustrate and interfere with Texas's authority, and hurts our economy. Though the Rule permits for variances, 43 C.F.R. §§ 3179.401; 3179.8, this displaces Texas's expertise regarding its own oil and gas resources and is unduly burdensome. This is an immediate injury, especially given that there is no assurance that variances will be granted, or on what terms.

The Rule also imposes restrictions that overlap with, and are different than, those imposed by Texas.[10] This duplicates and displaces Texas law, causing delays and confusion. RRC safely regulates gas flaring regarding Texas's unique geographic, geologic, and ecologic circumstances. The Rule's venting and flaring regulations are duplicative and overly burdensome.

The Rule also adversely impacts Texas's ability to regulate its air pollution

[10] One stated purpose of the Rule is the ". . . prevention of waste from Federal and Indian (other than Osage Tribe) leases, conservation of surface resources, and management of the public lands for multiple use and sustained yield." 43 C.F.R. § 3179.1. Similarly, the Texas Legislature has declared that, "The production, storage, or transportation of oil or gas in a manner, in an amount, or under conditions that constitute waste is unlawful and is prohibited." TEX. NAT. RES. CODE § 85.045.

control program. The Rule regulates venting and flaring at oil and gas production facilities, directly impinging Texas's authority over the same. Texas has exercised air-regulating primacy for decades, carrying out EPA's implementation of permitting and enforcement. This delegation cannot be diminished by the Rule, promulgated by a separate federal agency with authority to do so. *See* 5 U.S.C. § 706(2)(A), (C) (requiring courts to set aside agency action in excess of statutory jurisdiction).

Second, oil and gas creates significant tax revenue for Texas. The Rule threatens royalties to mineral owners and, thus, diminishes taxes. If permitting is delayed because minerals underlay federal surface rights, Texas's mineral owners are not be protected. Compliance with the Rule delays oil and gas development in Texas by forcing operators on federal lands to undertake additional compliance obligations through the overly burdensome requirement of filing waste minimization plans. In addition, oil and gas operators in Texas can be expected to refocus their planned drilling activities to non-federal lands rather than confront the possibility that the BLM will restrict production on new wells. This shifting of capital investments will result in significant loss of oil and gas resources and associated revenues.

In sum, the Rule places Texas's "sovereign interests and public policies at stake," and "the harm [Texas] stands to suffer [i]s irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas*, 249 F.3d at 1227. This goes beyond the "minimal" burden required for a party seeking intervention, *Utah Ass'n of Counties*, 255 F.3d at 1253, as it shows not just "that the impairment of [Texas's] substantial legal interest is *possible* if intervention is denied"—if intervention is denied, that impairment is inevitable.

D. Texas Is Not Adequately Represented.

A movant may satisfy Rule 24(a)(2)'s fourth requirement by demonstrating only that representation "may be inadequate." *Utah Ass'n of Counties*, 255 F.3d at 1254. "The possibility that the interests of the applicant and the parties may diverge

'need not be great' in order to satisfy this minimal burden." *Id*. That parties "share a general interest" does not mean that their specific interests are the same. *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001).

While others are challenging the Rule, they cannot represent Texas's unique interests. Indeed, in ruling on other governmental interventions, the Court stated that though they "are [all] governmental agencies, there is nothing to suggest their interests are exactly aligned." ECF No. 76 at 4. All sovereigns are "distinct and the underlying considerations of each may vary." *Id*. Texas oil and gas regulatory programs are unique to Texas and cannot be implemented by others. Texas developed its venting and flaring regulations to account for its specific geographic, geologic, and ecologic occurrences. Beyond merits briefing, Petitioners may disagree about other matters, like remedies or the terms of any potential settlement. *See NRDC v. Castle*, 561 F.2d 904, 906–08, 912–13 (D.C. Cir. 1997). Texas, therefore, satisfies the "minimal burden" of showing that the representation of others "may be inadequate."

E. Texas Has Article III Standing.

Texas has Article III standing. *See Deutsche Bank Nat'l Trust Co. v. Federal Deposit Ins. Corp*., 717 F.3d 189, 194 (D.C. Cir. 2013). Texas has (1) an injury-in-fact, (2) "fairly traceable to the governmental conduct alleged," that (3) is likely to be redressed by the requested relief. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). Texas is entitled to "special solicitude," *Id.* at 520, and possesses an "interest independent of and behind the titles of its citizens, in all the earth and air within its domain" that gives it "special position and interest." *Id.* at 518–19 (quotation omitted). "It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual." *Id.* at 518.

II. Alternatively, the Court Should Grant Permissive Intervention.

Alternatively, the Court should allow intervention permissively under Federal Rule of Civil Procedure 24(b)(1)(B). Texas satisfies those requirements.

Respectfully submitted on this the 21st day of March, 2017,

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CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 21st day of March, 2017, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks